

HAGENS BERMAN SOBOL SHAPIRO LLP
Shana E. Scarlett (217895)
715 Hearst Avenue, Suite 202
Berkeley, CA 94710
Telephone: (510) 725-3000
Facsimile: (510) 725-3001
shanas@hbsslaw.com

Attorneys for Plaintiff Theadora King

[Additional Counsel on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THEADORA KING, individually and on behalf)
of all others similarly situated,)

Plaintiff,)

v.)

SAFEWAY, INC.,)

Defendant.)
_____)

No. 08-cv-0999-EDL

PLAINTIFF'S NOTICE OF MOTION
AND MOTION TO REMAND

ACTION FILED: January 11, 2008

DATE: April 15, 2008

TIME: 9:00 a.m.

DEPT: Courtroom E, 15th Floor

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on April 15, 2008 at 9:00 a.m., or as soon thereafter as the matter may be heard in the Courtroom of the Magistrate Judge Elizabeth D. Laporte, United States District Court, Northern District of California, San Francisco Division, Courtroom E, 15th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff shall and hereby does move this Court, pursuant to 28 U.S.C. §§ 1447 and 1453, for an order remanding this case to state court. This motion is based on this notice of motion and motion, the memorandum or points and authorities in support thereof, the pleadings and records on file in this case and other such matters and argument as the Court may consider in the hearing of this motion.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION	1
II. BURDENS OF PROOF AND STANDARD OF REVIEW	1
III. ARGUMENT	2
A. Safeway Has Not Met Its Burden of Proving That CAFA Provides this Court with Jurisdiction over this Class Action	2
1. The Putative Class Consists Solely of California Citizens.....	2
2. Safeway Cannot Show that At Least One Member of the Class is of Diverse Citizenship	5
B. Even If CAFA Provides this Court with Jurisdiction, the Home-State Controversy Exception Requires this Court to Decline Its Jurisdiction.....	8
C. Federal Question Jurisdiction Also Does Not Exist	9
D. In Remanding, This Court Should Also Award “Just” Costs and Expenses, Including Reasonable Attorneys’ Fees	10
IV. CONCLUSION	10

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Ansley v. Ameriquest Mortg. Co.</i> , 194 F. Supp. 2d 1062 (C.D. Cal. 2002), <i>aff'd</i> , 340 F.3d 858 (9th Cir. 2003)	10
<i>Balcorta v. Twentieth Century-Fox Film Corp.</i> , 208 F.3d 1102 (9th Cir. 2000)	9, 10
<i>Braco v. MCI Worldcom Communs., Inc.</i> , 138 F. Supp. 2d 1260 (C.D. Cal. 2001)	10
<i>China Basin Props., Ltd. v. One Pass, Inc.</i> , 812 F. Supp. 1038 (N.D. Cal. 1993)	6
<i>In re FedEx Ground Package Sys.</i> , 2006 U.S. Dist. Lexis 1218 (N.D. Ind. Jan. 13, 2006)	4
<i>Gibson v. Chrysler Corp.</i> , 261 F.3d 927 (9th Cir. 2001)	10
<i>Gotro v. R & B Realty Group</i> , 69 F.3d 1485 (9th Cir. 1995)	10
<i>Grupo Dataflux v. Atlas Global Group, L.P.</i> , 541 U.S. 567 (2004)	7, 8
<i>Harrington v. Mattel, Inc.</i> , 2007 U.S. Dist. Lexis 95401 (N.D. Cal. Dec. 20, 2007)	2
<i>Hart v. FedEx Ground Package Sys.</i> , 457 F.3d 675 (7th Cir. 2006)	7
<i>Lao v. Wickes Furniture Co.</i> , 455 F. Supp. 2d 1045 (C.D. Cal. 2006)	6
<i>Larsen v. Pioneer Hi-Bred Int'l, Inc.</i> , 2007 U.S. Dist. Lexis 83505 (S.D. Iowa Nov. 9, 2007)	3, 7
<i>Lowdermilk v. United States Bank Nat'l Assoc.</i> , 479 F.3d 994 (9th Cir. 2007)	2
<i>Marks v. Chicoine</i> , 2007 U.S. Dist. Lexis 65671 (N.D. Cal. Aug. 21, 2007)	5
<i>McMorris v. TJX Cos.</i> , 493 F. Supp. 2d 158 (D. Mass. 2007)	3, 7, 8
<i>Miedema v. Maytag Corp.</i> , 450 F.3d 1322 (11th Cir. 2006)	5
<i>Moore v. Permanente Med. Group</i> , 981 F.2d 443 (9th Cir. 1992)	10

1 *Roche v. Country Mut. Ins. Co.*,
2 2007 U.S. Dist. Lexis 48921 (S.D. Ill. July 6, 2007) 3, 4

3 *Schorsch v. Hewlett-Packard Co.*,
4 417 F.3d 748 (7th Cir. 2005) 10

5 *Serrano v. 180 Connect, Inc.*,
6 478 F.3d 1018 (9th Cir. 2007) 1, 2, 6, 8

7 *State Farm Fire & Cas. Co. v. Tashire*,
8 386 U.S. 523 (1967) 7

9 *Sundy v. Renewable Envtl. Solutions, L.L.C.*,
10 2007 U.S. Dist. Lexis 75762 (W.D. Mo. Oct. 10, 2007) 6, 7, 8

11 **FEDERAL STATUTES**

12 28 U.S.C. § 1331 10

13 28 U.S.C. § 1332 *passim*

14 28 U.S.C. § 1447 1, 10

15 28 U.S.C. § 1453 1

STATEMENT OF ISSUES TO BE DECIDED

1. Whether this Court lacks jurisdiction over this action where Plaintiff and the putative class are citizens of California, where Safeway is also a citizen of California and where Safeway has failed to meet its burden of proof in removing this action from state court.

2. Whether even if this Court possessed jurisdiction pursuant to the Class Action Fairness Act of 2005, the “home-state” nature of the controversy would require the Court to otherwise decline that jurisdiction.

3. Whether pursuant to 28 U.S.C. § 1447(c), this Court should exercise its discretion to “require payment of just costs and any actual expenses, including attorney fees, incurred as a result of” Safeway’s improper removal of this case.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Theadora King, individually and on behalf of all others similarly situated and in support of Plaintiff's Motion to Remand, pursuant to 28 U.S.C. §§ 1447 and 1453, hereby states as follows:

I. INTRODUCTION

On January 11, 2008, Plaintiff Theadora King filed the present class action in the Superior Court of the State of California, County of Alameda against Defendant Safeway, Inc. ("Safeway"), seeking relief for the injuries sustained "as a result of Safeway's deceptive marketing of milk as organic when the milk is not, in fact, organic." Class Action Complaint, ¶ 1 ("Complaint" or "Compl."). Notwithstanding the plain language of Plaintiff's Complaint, which seeks certification of a class under California law, consisting *solely of citizens of California*, on February 19, 2008, Safeway removed the present action to this Court, relying on the provisions of 28 U.S.C. § 1332 as amended by the Class Action Fairness Act ("CAFA") of 2005. *See* Notice of Removal, ¶ 3 (Dkt. No. 1).

However, as will be demonstrated below, this Court lacks jurisdiction over this action where Plaintiff and the putative class are citizens of California, where Safeway is also a citizen of California and where Safeway has failed to meet its burden of proof. Furthermore, even if this Court possessed jurisdiction pursuant to CAFA, the "home-state" nature of the controversy would require the Court to otherwise decline that jurisdiction. As a result, Plaintiff respectfully requests that this matter be remanded to the Superior Court of the State of California, County of Alameda.

II. BURDENS OF PROOF AND STANDARD OF REVIEW

While the text of CAFA itself is "silent as to the burden of proof," the Ninth Circuit has "concluded that Congress intended to maintain the historical rule that it is the proponent's burden to establish a prima facie case of removal jurisdiction." *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007).¹ By contrast, to the extent a party argues against removal based on an

¹ All emphasis added and all internal quotations and citations removed, unless otherwise stated.

1 exception to CAFA, the burden of proof shifts as “the party seeking remand bears the burden to
2 prove an exception to CAFA’s jurisdiction.” *Serrano*, 478 F.3d at 1021-1022.

3 As observed by the Ninth Circuit in *Lowdermilk v. United States Bank Nat’l Assoc.*, 479
4 F.3d 994 (9th Cir. 2007), federal courts “are courts of limited jurisdiction and we will strictly
5 construe our jurisdiction,” particularly where “it is well established that the plaintiff is ‘master of
6 her complaint’ and can plead to avoid federal jurisdiction.” *Id.* at 998-99. “Because the Court
7 strictly construes the removal statute against removal, if there is *any doubt* as to the existence of
8 federal jurisdiction, the Court should remand the matter to state court.” *Harrington v. Mattel, Inc.*,
9 2007 U.S. Dist. Lexis 95401, at *6 (N.D. Cal. Dec. 20, 2007). “This burden generally remains the
10 same under CAFA.” *Id.*

11 III. ARGUMENT

12 A. Safeway Has Not Met Its Burden of Proving That CAFA Provides this Court with 13 Jurisdiction over this Class Action

14 Pursuant to CAFA, this Court has original jurisdiction over this class action so long as “the
15 matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and
16 is a class action in which ... any member of a class of plaintiffs is a citizen of a State different from
17 any defendant.” 28 U.S.C. § 1332(d)(2)(A). However, where Plaintiff and the putative class are
18 all citizens of California and where Safeway is also a citizen of California, minimal diversity is
19 absent, notwithstanding the fact of Safeway’s Delaware incorporation. As a result, this Court does
20 not have original jurisdiction over this putative class action and must remand.

21 1. The Putative Class Consists Solely of California Citizens

22 In arguing that jurisdiction exists in this matter, Safeway first suggests minimal diversity
23 exists because “Plaintiff’s class definition does not restrict the class to California citizens.” Notice
24 of Removal, ¶ 4. However, Plaintiff’s Complaint clearly limits the putative class to citizens of
25 California. In Paragraph 33, Plaintiff draws a class definition which limits this action to a state-
26 wide class of Californians:

27 Plaintiff seeks certification of a state-wide Consumer Class defined
28 as follows:

1 All persons in the State of California who purchased organic milk or
 2 milk products from Safeway during the time period of December 5,
 2003 through October 15, 2007.²

3 Compl., ¶ 33. In addition, near the outset of Plaintiff's Complaint, Plaintiff notes that: "[t]his
 4 litigation may not be removed to federal court under 28 U.S.C. § 1332 as amended by the Class
 5 Action Fairness Act of 2005, because *the members of the Plaintiff Class are citizens of the same*
 6 *state, California, as Defendant.*" Compl., ¶ 8 (emphasis added). As a consequence, and
 7 Safeway's myopic reading of Plaintiff's Complaint aside, this explicit disclaimer sufficiently
 8 demonstrates that the putative class is limited to "citizens" of California.

9 Notably, in *Roche v. Country Mut. Ins. Co.*, 2007 U.S. Dist. Lexis 48921, at *1 (S.D. Ill.
 10 July 6, 2007), a district court addressed a similar situation as that before this Court. In *Roche*, an
 11 Illinois plaintiff brought a class action against an Illinois insurance company regarding medical
 12 billing practices. *Id.* In examining the sufficiency of the plaintiff's complaint, the court noted that
 13 "the class is drawn to include only 'licensed healthcare providers in Illinois' ... and the complaint
 14 specifically disclaim[ed] the existence of diversity jurisdiction under CAFA on the grounds that
 15 'the proposed class consists only of medical providers within Illinois.'" *Id.* at *9 n.6. The court
 16 concluded "that Roche's allegations sufficiently restrict[ed] the proposed class to Illinois citizens,"
 17 adding that "even were there a dispute as to whether the class includes non-Illinois citizens,
 18 Country, which, as noted, has the burden of proof in this instance, has not produced any evidence
 19 of this." *Id.* at *10.

20 While the removing defendant did not dispute that the plaintiff limited her class to Illinois
 21 citizens, such a concession is not surprising given the express disclaimer regarding the scope of the

22
 23 ² While Safeway contends that "substantially identical class definitions" are found in
 24 *McMorris v. TJX Cos.*, 493 F. Supp. 2d 158 (D. Mass. 2007) and *Larsen v. Pioneer Hi-Bred Int'l,*
 25 *Inc.*, 2007 U.S. Dist. Lexis 83505, at *1 (S.D. Iowa Nov. 9, 2007), this is not true. In relevant part,
 26 the *McMorris* class definition was drawn to include "Residents of Massachusetts," *see McMorris*,
 27 493 F. Supp. 2d at 160, while the *Larsen* class definition involved "All persons *and entities* in the
 28 state of Iowa." *Larsen*, 2007 U.S. Dist. Lexis 83505, at *12 (emphasis added). Additionally, the
Larsen case is distinguishable where the court found that the defendant met its burden of proof
 having presented "testimony and evidence of its records that persons with out-of-state addresses
 from nearly forty different states purchased [the product at issue from defendant] in Iowa,
 including "evidence that ... out-of-state corporations purchased from Pioneer in Iowa." *Id.* at *13-
 15. Safeway has presented no such record evidence. *See infra* Section III.A.1.

1 putative class found in the plaintiff's complaint, and the court's observation that it "must resolve
 2 doubts against removal ... in the light most favorable to [the plaintiff]." *Id.* at *9; *see also In re*
 3 *FedEx Ground Package Sys.*, 2006 U.S. Dist. Lexis 1218, at *23-25 (N.D. Ind. Jan. 13, 2006)
 4 (granting plaintiffs' motion to remand in a case against a defendant with its principal place of
 5 business in Pennsylvania, where "[t]he complaint identifies the putative class action as containing
 6 only those who, at the time of the filing, were (or are) Pennsylvania citizens," and agreeing with
 7 the plaintiffs' reasoning "that there can be no minimal diversity (and thus no original jurisdiction)"
 8 under such facts).

9 Significantly, the *Roche* court found the plaintiff sufficiently limited the class to Illinois
 10 citizens where the plaintiff's complaint limited the class to "licensed healthcare providers in
 11 Illinois" and where "the proposed class consist[ed] only of medical providers within Illinois."
 12 *Roche*, 2007 U.S. Dist. Lexis 48921, at *9. Notably, the language in Plaintiff's Complaint before
 13 this Court is stronger and more specific as to the citizenship of the class, where the class definition
 14 has been explicitly limited to California citizens: "***the members of the Plaintiff Class are citizens***
 15 ***of the same state, California, as Defendant.***" Compl., ¶ 8 (emphasis added); *see also FedEx*, 2006
 16 U.S. Dist. Lexis 1218, at *24 ("The explicit requirements found in § 1332(d)(2) necessitate a
 17 showing that at least one member of the putative class action is of diverse citizenship. In trying to
 18 make such a showing, *FedEx* submits three affidavits identifying people who arguably were not
 19 citizens of Pennsylvania at the time the complaint was filed. This is not an adequate showing of a
 20 diverse member of the putative class; anyone not a citizen of Pennsylvania at the time of the
 21 complaint would not be member of the putative class.").

22 Finally, like the defendant's failure in *Roche* to produce evidence that out-of-state citizens
 23 were members of the class, Safeway has produced no evidence that non-California citizens are
 24 "persons in the State of California who purchased organic milk or milk products from Safeway."
 25 Compl., ¶ 33; *Roche*, U.S. Dist. Lexis 48921, at *8 n.6. In the place of proof, Safeway submits
 26 conjecture, *i.e.*, that citizens of neighboring states are putative class members as "Safeway has
 27 many stores in California which are close to, or encroach upon, the borders of other states." Notice
 28 of Removal, ¶ 6. In doing so, Safeway relies on the declaration of one of its employees, Laura A.

Donald, an Assistant Vice President and Assistant Secretary. *Id.*, Ex. 3, ¶ 1 (Declaration of Laura A. Donald (“Donald Decl.”)). But, while declaring to have knowledge regarding “the amount and value of Safeway’s milk sales” and “the location of Safeway retail stores in California,” *Id.* at ¶¶ 2-3, Safeway has not demonstrated that Ms. Donald is knowledgeable regarding the *citizenship* of Safeway’s customers, even though she concludes that “[c]itizens of other states (*e.g.*, Nevada) purchase milk from these stores.” *Id.* at ¶ 5. *See, e.g., Marks v. Chicoine*, 2007 U.S. Dist. Lexis 65671, at *6 n.2 (N.D. Cal. Aug. 21, 2007) (denying summary judgment and recognizing that “[a] declaration is a statement of facts which are personally known to the person making the declaration” and that “[t]he facts in a declaration must be admissible in evidence, *i.e.*, evidentiary facts and not conclusions or argument”). And, while Safeway contends generically that Nevada residents “purchase milk” from Safeway, Plaintiff’s Complaint concerns purchases of not just “milk” but “organic milk.” Compl., ¶ 33. This lack of specificity further demonstrates Safeway’s failure to meet its removal burden. *Miedema v. Maytag Corp.*, 450 F.3d 1322 (11th Cir. 2006) (affirming district court’s remand of a state law class action involving the defective manufacture of certain appliances brought on behalf of Florida residents under Florida law, where a declaration submitted by defendant in support of removal was based on the total number of appliances sold and where the complaint did not allege that every such appliance sold during the class period was defective).

Accordingly, the plain language of Plaintiff’s Complaint belies any argument that Plaintiff failed to limit the class in this case to citizens of California, particularly where Safeway has not met its burden of establishing a *prima facie* case of removal jurisdiction.

2. Safeway Cannot Show that At Least One Member of the Class is of Diverse Citizenship

Because the putative class is limited to California citizens, Safeway cannot show that “any member of a class of plaintiffs is a citizen of a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A). As a logical result, where the class consists of California citizens, and where

1 Safeway is a citizen of California maintaining its principal place of business in California,³ no
 2 members of the class are citizens “of a State different” than Safeway. Thus, minimal diversity
 3 under CAFA is absent. *See, e.g., Lao v. Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1061 (C.D.
 4 Cal. 2006) (“For the purpose of diversity jurisdiction, a corporation is a citizen of any state where it
 5 is incorporated and of the state where it has its principal place of business. Here, Wickes is
 6 incorporated under the laws of the State of Delaware. Thus, to defeat jurisdiction under CAFA it
 7 must be established that California is Wickes’ principal place of business.”) (questioned on other
 8 grounds by *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018 (9th Cir. 2007)).

9 For example, in *Sundy v. Renewable Env'tl. Solutions, L.L.C.*, 2007 U.S. Dist. Lexis 75762,
 10 at *1, after determining that the defendant, a Delaware corporation, maintained its principal place
 11 of business in Missouri, the court turned to the issue of “whether [the defendant] has demonstrated
 12 the minimal diversity required by CAFA.” *Id.* at *10. In doing so, the Court recognized that
 13 “[t]his requirement is satisfied if there is at least one member of the class who is not a citizen of
 14 either Missouri or Delaware.” *Id.* In ruling in favor of the plaintiffs, the court noted that the
 15 defendant “failed to sustain their burden of demonstrating there is a member of the class who is
 16 neither a citizen of Missouri nor a citizen of Delaware, and have therefore failed to demonstrate
 17 federal jurisdiction exists.” *Id.* Like the defendant in *Sundy*, Safeway has also failed to
 18 demonstrate that federal jurisdiction exists.

19 Safeway also suggests that minimal diversity exists where Plaintiff is a citizen of California
 20 and where Safeway is a citizen of California and Delaware. In doing so, Safeway relies on one
 21 selectively quoted decision by the U.S. Supreme Court. Notice of Removal, ¶ 5 (quoting *Grupo*
 22

23 ³ Unlike defendants in other cases, *see, e.g., Sundy v. Renewable Env'tl. Solutions, L.L.C.*,
 24 2007 U.S. Dist. Lexis 75762, at *1 (W.D. Mo. Oct. 10, 2007), Safeway concedes that it maintains
 25 its principal place of business in California and is thus a citizen of California. *See* Notice of
 26 Removal, ¶ 5 (“Safeway is a Delaware corporation with its principal place of business in the State
 27 of California and thus, is a dual citizen of Delaware and California.”) (citing 28 U.S.C.
 28 § 1332(c)(1)). In light of this concession, it is also evident that Safeway cannot demonstrate the
 existence of complete diversity necessary under non-CAFA based diversity jurisdiction. *See, e.g.,*
China Basin Props., Ltd. v. One Pass, Inc., 812 F. Supp. 1038, 1041 (N.D. Cal. 1993) (“One Pass
 is a citizen of both California and Delaware for diversity purposes. Because Plaintiff is also a
 citizen of California, the parties lack complete diversity and the Court is without jurisdiction to
 hear Plaintiff’s claims against One Pass.”).

1 *Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 578 n.6 (2004)). However, *Grupo* is of no
 2 assistance to Safeway where the Court commented on the issue of minimal diversity as *dicta*, did
 3 so contrary to existing precedent and without citation to supporting authority.

4 As selectively quoted by Safeway, the Court in *Grupo* addressed “minimal diversity” as
 5 follows:

6 We understand “minimal diversity” to mean the existence of at least
 7 one party who is diverse in citizenship from one party on the other
 8 side of the case, even though the extraconstitutional “complete
 9 diversity” required by our cases is lacking. It is possible, *though far
 from clear*, that one can have opposing parties in a two-party case
 who are cocitizens, and yet have minimal Article III jurisdiction
 because of the multiple citizenship of one of the parties.

10 *Grupo*, 541 U.S. at 578 n.6 (emphasizing language from *Grupo* excluded by Safeway). In addition
 11 to omitting the language “though far from clear” in quoting *Grupo* to this Court, Safeway excluded
 12 another sentence which immediately followed the above quotation, in which the Court attempted to
 13 distinguish contrary precedent: “Although the Court has previously said that minimal diversity
 14 requires ‘two adverse parties [who] are not co-citizens,’ the Court did not have before it a multiple-
 15 citizenship situation.” *Id.* (quoting *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531
 16 (1967)). *But see State Farm*, 386 U.S. at 531 (“[T]his Court and the lower courts have concluded
 17 that Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on
 18 diversity, *so long as any two adverse parties are not co-citizens.*”). *Compare id.* (construing the
 19 federal interpleader statute) with *Hart v. FedEx Ground Package Sys.*, 457 F.3d 675, 676-677 (7th
 20 Cir. 2006) (“For many years, it has permitted minimal diversity suits under the federal interpleader
 21 statute, 28 U.S.C. § 1335. In 2005, it did the same thing for large class actions, when it enacted
 22 CAFA.”).

23 Of the three courts⁴ quoting the *Grupo* footnote’s reference to minimal diversity in the
 24 context of CAFA, only the *Sundy* court has analyzed its applicability to CAFA with respect to a
 25
 26

27 ⁴ The three cases include *Sundy*, 2007 U.S. Dist. Lexis 75762, at *10 n.4, and two cases cited
 28 by Safeway, *McMorris*, 493 F. Supp. 2d at 163 and *Larsen*, 2007 U.S. Dist. Lexis 83505, at *11-
 12.

removing defendant's citizenship.⁵ Indeed, in *Sundy*, the court explicitly declined "to adopt Defendants' formulation as a correct statement of law" where defendant "suggest[ed] that minimal diversity exists unless a member of the class is a citizen of both Missouri and Delaware" in an action filed in Missouri by Missouri citizens against a Delaware corporation doing business in Missouri. *Sundy*, 2007 U.S. Dist. Lexis 75762, at *11 n.4. And, in doing so, the court also rejected outright the defendant's reliance "on dicta from the Supreme Court's opinion in *Grupo Dataflux v. Atlas Global Group, L.P.* [where,] in addition to being dicta, that passage acknowledged this proposition was 'possible, though far from clear,' did not reference any supporting authority, and noted the existence of contrary authority." *Id.*

Accordingly, because minimal diversity (and complete diversity) is absent in this case, this Court must remand this matter to the Superior Court of the State of California, County of Alameda.

B. Even If CAFA Provides this Court with Jurisdiction, the Home-State Controversy Exception Requires this Court to Decline Its Jurisdiction

Even if this Court found that it has jurisdiction over this class action pursuant to CAFA, this Court must decline its jurisdiction because of the "home-state controversy" exception since more than two-thirds of the class members are from California and Safeway is also from California. As explained by the Ninth Circuit:

Section 1332(d)(4)(B) sets forth what has been dubbed the 'home-state controversy' exception:

A district court *shall decline to exercise jurisdiction* under [§ 1332(d)(2)]... (B) where two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants, are citizens of the State in which the action was originally filed.

Serrano, 478 F.3d at 1022-23 (quoting 28 U.S.C. § 1332(d)(4)(B)). To start, because Plaintiff has named only one Defendant, there can be no doubt that that Safeway is a "primary defendant" in

⁵ The only other court to come close to analyzing the *Grupo* issue did not directly decide the issue. See *McMorris*, 493 F. Supp. 2d at 163-64 (observing that "[t]he Supreme Court recently noted that minimal diversity may well be satisfied in any situation where one of the parties has multiple citizenship," but observing the issue to be "left open" and ultimately not dispositive to the court's ruling where the defendant "sufficiently alleged a 'reasonable probability' that at least one member of the McMorris class is domiciled in a state other than Massachusetts or Delaware, the two states in which TJX is domiciled").

1 this case. Likewise, there can be no doubt that this matter was originally filed in California and
 2 that Safeway is a citizen of California, maintaining its principal place of business within the state.

3 To the extent that a dispute exists, it only exists as to the issue of whether “two-thirds or
 4 more of the members of all proposed plaintiff classes” are citizens of California. 28 U.S.C.
 5 § 1332(d)(4)(B). However, this too is a non-issue because the membership of the proposed
 6 plaintiff class is limited to citizens of California.⁶ See *supra* Section III.A.1. Thus, where this
 7 matter was filed in California under California law, where all “of the members of all proposed
 8 plaintiff classes” are citizens of California and where Safeway, the only and therefore primary
 9 defendant, is also a citizen of California, this Court must decline its jurisdiction.

10 **C. Federal Question Jurisdiction Also Does Not Exist**

11 In addition, because Plaintiff’s Complaint seeks relief solely under California law, no
 12 questions of federal law are implicated. See Compl., ¶¶ 40-72. While Safeway submits in a
 13 footnote that “alternate grounds for removal may exist, namely federal question jurisdiction based
 14 on principles of complete preemption,” it has only reserved “the right to raise issues of complete
 15 preemption...in support of a motion to dismiss at the appropriate time.” Notice of Removal, ¶ 3
 16 n1. As a result, Safeway has waived such arguments as a ground for removal (or at a minimum has
 17 a failed to carry its burden of proving its applicability). Nevertheless, even if this Court found that
 18 Safeway did not waive the ability to raise the issue on removal, the Ninth Circuit has ruled that a
 19 defense of complete preemption is insufficient to invoke federal question jurisdiction. See, e.g.,
 20 *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1107 (9th Cir. 2000) (“[T]he
 21 ‘complete preemption’ doctrine does not abrogate the standard rule that a defense of preemption

22 ⁶ As previously noted, Safeway argues that it “has many stores in California which are close
 23 to, or encroach upon the borders of other states,” to conclude that “[c]itizens of other states, (e.g.,
 24 Nevada) purchase milk from these stores.” Notice of Removal, Ex. 3, ¶ 5 (Donald Decl.). During
 25 the class period, California’s population far surpassed the combined population of its neighboring
 26 states. According to the U.S. Census Bureau, 36,457,549 people were estimated to live in
 27 California during the class period, compared with 2,495,529 in Nevada, 6,166,318 in Arizona and
 28 3,700,758 in Oregon during the same time period. See U.S. Census Bureau, State & County Quick
 Facts <http://quickfacts.census.gov/qfd/index.html> (last visited Feb. 29, 2008). Of the combined
 population (48,820,154), California’s population comprises approximately 74.7% of the total.
 While the focus of 28 U.S.C. § 1332(d)(4)(B) is on citizenship rather than population, this figure is
 nevertheless illustrative that the requirement that two-thirds of the class be citizens of California is
 met in this case.

1 does not create federal question jurisdiction.”). Accordingly, federal question jurisdiction under 28
 2 U.S.C. § 1331 is also absent.

3 **D. In Remanding, This Court Should Also Award “Just” Costs and Expenses, Including**
 4 **Reasonable Attorneys’ Fees**

5 Pursuant to 28 U.S.C. § 1447(c), this Court “may require payment of just costs and any
 6 actual expenses, including attorney fees, incurred as a result of” Safeway’s improper removal of
 7 this case. *See id.*; *Gotro v. R & B Realty Group*, 69 F.3d 1485, 1487-88 (9th Cir. 1995). This
 8 Court may award attorneys’ fees when defendant’s removal is wrong as a matter of law. *Balcorta*,
 9 208 F.3d at 1106 n.6 (affirming fee award based on district court’s correct decision to remand);
 10 *Moore v. Permanente Med. Group*, 981 F.2d 443, 448 (9th Cir. 1992) (indicating that bad faith
 11 need not be demonstrated to award fees).

12 In numerous other cases, courts have awarded such attorneys fees. *See, e.g., Gibson v.*
 13 *Chrysler Corp.*, 261 F.3d 927, 932, 950 (9th Cir. 2001) (\$28,650); *Ansley v. Ameriquest Mortg.*
 14 *Co.*, 194 F. Supp. 2d 1062, 1065 (C.D. Cal. 2002) (\$3,600), *aff’d*, 340 F.3d 858 (9th Cir. 2003);
 15 *Braco v. MCI Worldcom Commc’ns., Inc.*, 138 F. Supp. 2d 1260, 1270 (C.D. Cal. 2001) (\$7,500);
 16 *accord Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748, 751-52 (7th Cir. 2005) (“Defendants
 17 should recognize that 28 U.S.C. § 1447(c) makes an award of attorneys’ fees the norm for
 18 improper removal.... [W]e invite the plaintiffs to file (in the district court) an appropriate request
 19 for reimbursement of the additional legal expenses to which they have been put by HP’s efforts to
 20 move this litigation from state to federal court.”). Accordingly, Plaintiff requests this Court grant
 21 just attorneys’ fees and expenses incurred in litigating Plaintiff’s Motion to Remand.

22 **IV. CONCLUSION**

23 Simply put, in a case brought by a California citizen under California law, against a
 24 company that is California citizen and limited to California citizens, Safeway cannot demonstrate
 25 that this case belongs in federal court. Accordingly for the reasons provided above and in her

26 //

27 //

28 //

1 Motion to Remand, Plaintiff respectfully requests this Court to remand this matter to the Superior
2 Court for the State of California, County of Alameda, grant an award of reasonable attorneys' fees
3 and costs, and grant all such other relief as this Court deems necessary and appropriate.
4

5 Dated: March 5, 2008

Respectfully submitted

6 HAGENS BERMAN SOBOL SHAPIRO LLP
7

8 By /s/ Shana E. Scarlett
9 SHANA E. SCARLETT (217895)

10 715 Hearst Avenue, Suite 202
11 Berkeley, California 94710
12 Telephone: (510) 725-3000
Facsimile: (510) 725-3001
shanas@hbsslaw.com

13 Steve W. Berman
14 HAGENS BERMAN SOBOL SHAPIRO LLP
15 1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101
Telephone: (206) 623-7292
Facsimile: (206) 623-0594
steve@hbsslaw.com

17 Elizabeth A. Fegan
18 HAGENS BERMAN SOBOL SHAPIRO LLP
19 820 North Boulevard, Suite B
Oak Park, Illinois 60301
Telephone: (708) 776-5600
Facsimile: (708) 776-5601
beth@hbsslaw.com

20 *Attorneys for Plaintiff Theadora King*
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses registered, as denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

/s/ Shana E. Scarlett
SHANA E. SCARLETT

Mailing Information for a Case 3:08-cv-00999-EDL

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Steve W. Berman**
steve@hbsslaw.com,robert@hbsslaw.com,heatherw@hbsslaw.com,bonneym@hbsslaw.com
- **Elizabeth Anne Fegan**
beth@hbsslaw.com
- **Livia M. Kiser**
livia.kiser@lw.com,che filing@lw.com
- **Mark S. Mester**
mark.mester@lw.com,che filing@lw.com,barbara.butl@lw.com
- **Shana E. Scarlett**
shanas@hbsslaw.com,nancyq@hbsslaw.com,sf_filings@hbsslaw.com
- **Viviann C Stapp**
viviann.stapp@lw.com,#sfdocket@lw.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Steve W. Berman
Hagens Berman Sobol Shapiro LLP
1301 Fifth Avenue, Suite 2900
Seattle, WA 98101